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H.L.A. Hart: a Twentieth-Century Oxford Political Philosopher

John Finnis

I

Herbert Hart was born in 1907, a son of prosperous tailors in the north of England. From the age of eleven he was boarding-schooled in the south, but after some years was schooled close to home, at an excellent grammar school where he finished as Head Prefect, regarded by the Head Master as a head boy of unsurpassed loyalty and capacity. By competitive scholarship examination he proceeded to New College, one of the University of Oxford's oldest and best colleges, where he studied Greek, Latin, ancient history and philosophy, with brilliant success. Before, during and after his Oxford studies, he travelled widely throughout Europe; he had a gift for languages and throughout his life an immense enthusiasm for places, people, and literature.

Passing the Bar exams in late 1930, Hart joined commercial chambers in Lincoln's Inn where he practiced with notable success, especially in tax matters. Though he had joined the Inns of Court Regiment early in his career at the Bar, and participated enthusiastically in stag-hunting and like pursuits, his political views, always liberal, moved decisively left during the mid-1930s even before he became associated in 1936 with Jenifer Williams, who had been a member of the Communist Party since 1934 and in her early years as a civil servant – which coincided with their beginning to live together – even had a Soviet controller. But, as she later wrote of Hart (whom she married in late 1941), “he was strongly opposed to communism both as theory and practice.”¹

In June 1940, Hart joined MI5, the intelligence organization dedicated to counter-espionage in Britain. There he worked until the end of the War on counter-espionage, on the dissemination of disinformation to the enemy, and on the processing of results of MI6's ultra secret deciphering of the German codes; he was regarded within MI5 as outstandingly able, reliable and acute, and patriotically maintained the mandated secrecy about these activities down to the end of his life.

At War's end, Hart returned not to the Bar but to New College, as fellow and tutor in Philosophy. It was hoped and expected that he would maintain the anti-empiricist tradition of his Platonist tutor H.W.B. Joseph, but he soon gravitated to the modern-minded opposition, the circle of philosophers who under J.L. Austin's leadership pursued a way of thinking philosophically that Hart like others was content to call linguistic, or sometimes analytical. Still, immediately before his election in 1952 to the chair of Jurisprudence, he was lecturing on Legal & Political Theories in Plato.

Hart's inaugural lecture in 1953 laid out and exemplified an agenda for an analytical jurisprudence informed by linguistic philosophy, which he presented as practiced if not inaugurated by Jeremy Bentham. Nevertheless, as we shall see, his master work *The Concept of Law* (1961) is not in its deep structure either linguistic or analytical. Nor does Hart's best-known book, *Law, Liberty & Morality* (1963), owe anything to fashions in philosophical methodology.

¹ Jenifer Hart, *Ask Me No More: An Autobiography* (London: Peter Halban, 1998), 72.

In 1968, the year his *Essays on Punishment & Responsibility* appeared and six years before retirement age, Hart left the chair of Jurisprudence and the university (though not the family house in central Oxford), feeling he had said all he had to say.² He worked for the next five years on editing and commenting in essay form on Bentham's accounts of law, rights, powers, and legal language; and continued the quasi-governmental work he had begun in 1966 as a member of the Monopolies Commission. He returned formally to Oxford University as Principal of Brasenose College, 1973-78, and thereafter until his death in December 1992 was granted a room for work in University College, where he had taught and written as Professor of Jurisprudence. A principal scholarly concern of his in these late years was preparing a response to some main critics of *The Concept of Law*; the fruits of this, a response to his successor in the chair, Ronald Dworkin, appeared posthumously in 1994, edited by Hart's closest jurisprudential successor, Joseph Raz, as Postscript to that book's second edition.

Not long after his seventieth birthday, Hart wrote: "loss of the belief that [moral judgment and argument] are backed by something more than human attitudes or policies is, and will continue to be, for many as profound as the loss of belief in God."³ That he had undergone the latter loss, at some early stage of his life, is clear from the exceedingly intimate (and philosophically informed) biography published in 2004.⁴ In retrospect, at least, everything suggests that – at least from the time he began to publish philosophical work -- he also lacked the other belief, that moral judgments can be really true. But his activities as a philosopher, teacher, mentor, colleague and friend, like his performance of wartime duties in defence of his country, his fidelity to his family and his devoted care for their disabled youngest child, amply display a morally demanding range of virtues.

II

Hart's significance can be understood only when his work is measured against conceptions of political philosophy that were dominant in Oxford in the years between Hart's postwar return and the publication of his *The Concept of Law*. Though these conceptions might be divided, like Hart's own philosophical formation, between the pre-"linguistic" and the "linguistic," they had much in common. As Eric Voegelin emphasizes in his mordant survey "The Oxford Political Philosophers,"⁵ written in the summer of 1952, a contemporary pre-linguistic Oxford political philosopher as methodologically informed and representative as A.D. Lindsay held that political theory transcends the description of institutions just by being a study of the "operative ideals" which, as beliefs of citizens, sustain their respective states in existence. This makes political theory essentially a history of ideas, with some sorting, arranging and axiomatising in the mode (as Voegelin observes) of theology (which takes its principles not from philosophical considerations but as givens, *dogmata*). Lindsay's concession that there remains a question about the "absolute worth" of operative ideals is fleeting:

² *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford & New York: Oxford University Press, 2004) [hereafter Lacey, *Hart*], 289.

³ Hart, "Morality and Reality," *The New York Review of Books* 25/3 (March 9, 1978), 35.

⁴ Lacey, *Hart*.

⁵ *The Philosophical Quarterly* 3 (1953) 97-114 at 108.

“the primary business of the political theorist” remains the understanding of *actually operative* ideals; “political theory, then, is concerned with fact.”⁶

What then of the linguistic-philosophical approach becoming dominant in Oxford around 1950? It was approvingly summarized, towards the end of its dominance, by Anthony Quinton, introducing a book of *Oxford Readings in Political Philosophy*. The great works in political philosophy (or, synonymously, political thought or theory), from Plato and Aristotle to Marx and Mill, consist, said Quinton, (i) of “factual or descriptive accounts of political institutions and activities” (political science), (ii) of “recommendations about the ideal ends that political activity should pursue and about the way political institutions should be designed in order to serve those ends” (ideology), and (iii) only to “a small, though commonly crucial extent”, of “conceptual reasonings,” the kind of reasonings now known, according to Quinton, to be the only properly philosophical activity, namely “classifying and analyzing the terms, statements and arguments of the substantive, first-order disciplines” or modes of thought, disciplines or modes of thought which are “concerned with some aspect or region of the world” -- unlike philosophy, which is “conceptual and critical, concerned with *them* [scil. those substantive, first-order modes of thought] rather than with the reality they investigate.”⁷

What makes reasoning “conceptual” and/or “analytical”? How might such reasoning add anything to descriptions of the institutions found in historically given societies and “recommendations” (or indeed Lindsay-like historical accounts) of “ideals”? These questions are left in shadow by Quinton and indeed by the whole school of philosophers whose self-understanding Quinton was articulating. Hart too, while framing much of *The Concept of Law* in terms of “analysis” of “concepts”, says little to make explicit what counts as conceptual or analytical, or what counts as success in such analysis.⁸ But what he proposed as the fruits of his philosophical work in that book, and the arguments deployed to yield them, together made clear – showed in action -- that political philosophy could and can still be pursued in a way that is simply not envisaged in Quinton’s triad (institutional description, ideological recommendation, conceptual analysis). That way, moreover, is continuous with main parts of the tradition of political philosophizing which that triad so mischaracterizes.

Hart’s preface to *The Concept of Law* speaks of “the political philosophy of this book.” This seems to point to two of the book’s theses or themes. The first is *articulated* firmly in terms of “analysis” of “concepts” By “referring”, Hart says, to “manifestations” of “the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others’ behaviour,” we can provide an “analysis” that dissipates “the obscurity

⁶ A.D. Lindsay, *The Modern Democratic State* (Oxford: Oxford University Press, 1943), 45; cf. 37-8; also 47: “It is a philosophical discipline, not because it tries to base our conduct in politics on metaphysics, but because it demands that we should reflect on what we actually do and will, make explicit to ourselves what we do implicitly, think out the assumptions on which we as a matter of fact act.”

⁷ A.M. Quinton (ed.), *Political Philosophy* (Oxford Readings in Philosophy) (London: Oxford University Press, 1967), 1. Note that neither (ii) nor even (i) is an “investigation” of “reality.” Quinton reports (*ibid.*, 2), without disavowing, the “widely held” view that “there really is no such subject as political philosophy apart from the negative business of revealing the conceptual errors and methodological misunderstandings of those who have addressed themselves in a very general way to political issues.”

⁸ He quotes approvingly (*The Concept of Law*, preface) from J.L. Austin, leader of the Oxford school of “ordinary language”, “analytical” philosophy: “a sharpened awareness of words [can be used] to sharpen our perception of the phenomena.” Here “perception” is an evasive word for understanding, and “phenomena” for reality, or truths.

which still lingers about [the concepts (which bestride both law and political theory) of the state, of authority, and of an official...]" For while some manifestations of the internal point of view – those under “the simple regime of primary rules” -- are “most elementary”, the “range of what is said and done from the internal point of view is much extended and diversified” with “the addition ... of secondary rules”, an addition that brings with it “a whole set of new concepts... [including] the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public.” Thus “the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication” is not only the heart of a legal system but also “a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.”⁹

What matters here is not the various technical problems that commentators have identified in details of this analysis.¹⁰ Rather, it is the argumentation employed by Hart. This offers to show that the distinctions marked by his new technical terms -- internal and external points of view; primary and secondary rules -- are distinctions not just in “legal thought” or “political theory” but in the social reality that he often prefers to call “social phenomena”, reality that if it does not exist (as it does in our here and now) can in favourable circumstances be deliberately and reasonably brought into being, as state, law, legal system, courts, legislatures, and so forth. And Hart’s argumentation matters because it asserts that alternative “general” accounts of law failed to recognize both the variety of ways on which rules of law *function* and, more fundamentally, the variety of *functions* which are served, or possessed, by social rules and legal systems, and by the main components of legal systems.

So (in Hart’s account) he two fundamental ways in which rules function as guides to behaviour are by imposing obligations and conferring powers. But if a theorist, like Kelsen, denies that this duality of normative functioning is fundamental, Hart refutes him by pointing to the different functions served by the two types of rule. *Obligation-imposing* rules guide both the uncooperative (by threatening them with sanctions) and those who are willing to cooperate if only they are told what is required of them.¹¹ *Power-conferring* rules, understood “from the point of view of those [private persons] who exercise them,” confer on private citizens the “huge and distinctive amenity” of being “private legislator[s]”, “made competent to determine the course of the law within the sphere of [their] contracts, trusts, wills, and other structures of rights and duties which [they are thereby] enabled to build”; and the introduction into society of rules conferring *public* powers such as legislative or judicial powers to make authoritative enactments and orders “is a *step forward* as important to society as the invention of the wheel.”¹² The difference in normative types (ways of functioning) is grounded on the differences in social function, that is, on the different *reasons for valuing them*, which make exercise of

⁹ Ibid., 98-99.

¹⁰ Thus, as Joseph Raz showed, not all secondary rules are power-conferring, and not all power-conferring rules are secondary: “The Functions of Law,” in Raz, *The Authority of Law* (Oxford University Press, 1979), 163-79 at 178-9. There is in fact a good deal of terminological inconsistency and substantive flux in *The Concept of Law*, in relation to the distinctions and relations between kinds of rule, as also about the precise characteristics and content of “internal” and “external” points of view.

¹¹ Ibid., 39-40. Strictly speaking, the threat of sanction is created by a distinct or distinguishable ancillary rule empowering and to some extent obligating officials to impose penalties on those who violate the obligation-imposing rule.

¹² Ibid., 41-2 (emphasis added).

powers “a form of *purposive activity* utterly different from performance of duty or submission to coercive control.”¹³

Although Hart loyally continues to speak of this argumentation as “giv[ing] some...analysis of what is involved in the assertion that rules of these two types exist,”¹⁴ it is clear that what is going on in his explanation of “the features of law”, and in his claim that his explanation has superior ‘explanatory power,’ is not merely linguistic or conceptual.¹⁵ Rather, it is an acknowledgement, or reminder, or disclosure, of certain aspects of the human condition as it really is. His later reflections on the grounding of the concept(s) of “need and function” enable us to be more precise: in Hart’s own self-understanding, appeals to function are “ways of *simultaneously describing and appraising* things by reference to the contribution they make”¹⁶ to a “proper end of human activity.”¹⁷

Those later reflections are articulated by Hart in relation to the second of the two theses or themes he thought made a contribution to political philosophy: his discussion, in *The Concept of Law*’s chapter “Law and Morals,” of what he calls “The Minimum Content of Natural Law.”¹⁸ The section bearing this title – which might equally well have been “The Minimum Content of Positive Law”¹⁹ – argues vigorously, though with many signs of anxiety, that we should reject “the positivist thesis that ‘law may have any content’.” Besides definitions of words and “ordinary statements of fact”, there is “a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.”²⁰ More precisely, such contingently *universal* truths include statements about what Hart calls “natural necessity”, by which, in this precise context, he means the *rational* necessity yielded by the conjunction of a universal human “aim” and various natural facts or “truisms” such as that human beings are approximately equal to each other in strength and vulnerability, are limited in their “altruism”, understanding and strength of will, and are subject to scarcity of resources and the need for a division of labour to exploit them.²¹ Given the common or universal wish to continue in existence (“survive”), and the truisms about vulnerability, “what reason demands is *voluntary* co-operation in a *coercive* system.”²²

Hart’s anxiety about this head-on challenge, not only to Kelsenian legal positivism but to the reigning assumptions (such as Quinton’s or Lindsay’s) about method in political philosophy, is manifested in the immediately preceding, preparatory

¹³ Ibid., 41 (emphases added).

¹⁴ Ibid., 81.

¹⁵ Id.

¹⁶ Ibid., 192.

¹⁷ Ibid., 191 (emphasis added).

¹⁸ Ibid., 193.

¹⁹ For the conclusions it reaches on p. 199 concern the “indispensable features of municipal law” and and reject “the positivist thesis that ‘law may have any content’.” See also the phrase “what content a legal system must have” in the 1957/58 essay quoted below at n. 26. But Hart’s attention wavers between features indispensable in any subsisting society (e.g. one living by primary, pre-legal rules alone) and features indispensable for a legal system (in which primary rules exist in union with secondary rules and institutions). This last point has been clarified for me by comments to me by Cristóbal Orrego, whose understanding of Hart is unrivalled: see his *HLA Hart: Abogado del Positivismo Jurídico* (Pamplona: Eunsa, 1997).

²⁰ Ibid., 199-200.

²¹ Ibid., 194-7.

²² Ibid., 198.

pages. On the one hand, he shows here that even after Aristotelian principles of cosmology and physics have been expelled, we cannot sensibly talk about, or adequately understand, human beings without having a “teleological view.” He instances our talk of natural “human *needs* which it is *good* to satisfy,”²³ and of “the *functions* of bodily organs”²⁴ – all the talk that makes possible our talk of harm and injury. He sketches, albeit without unambiguously endorsing or repudiating, a more developed version of this teleology of human existence and nature: “a condition of biological maturity and developed physical powers” which “also includes, as its distinctively human element, a development and excellence of mind and character manifested in thought and conduct.”²⁵

But on the other hand, just at this point he shrinks back, declaring that “what makes sense of this mode of thought and expression is...the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence.”²⁶ This drastically limited – and deeply ambiguous²⁷ -- conception of “the proper end of human activity” he ascribes to Hobbes and Hume, whose “modest” or “humble” conception of human ends should be preferred to the “more complex and debatable” conceptions of Aristotle or Aquinas. Hart gives no sign, in this book, of noticing that survival, even when we ignore its ambiguities, is quite inadequate, as an aim or end, to account for the developed “excellences of mind and character.” The inadequacy goes further, for concern to survive does not begin to account for the fundamental elements in his concept of law, the secondary rules introduced (as his first theme or thesis made clear) to remedy the defects – the social problems – which plague a society governed only by “social morality’s” pre-legal “primary rules”.

Hart soon tacitly acknowledged this inadequacy. Writing the following year about “social morality,” not as temporally pre-legal but as the standards acknowledged, over and above the law, even in legally ordered societies, he articulated universal values, virtues and standards, still on a purportedly Hobbesian basis but now with an adjusted rationale:

...all social moralities...make provision in some degree for such universal values as individual freedom, safety of life, and protection from deliberately inflicted harm....Secondly,...the spirit or attitude which characterizes the practice of a social morality is something of very great value and indeed quite vital for men to foster and preserve in any society. For in the practice of any social morality there are necessarily involved what may be called *formal* values as distinct from the *material* values of its particular rules or content. In moral relationships with others the individual sees questions of conduct from an impersonal point of view and applies general rules impartially to himself and to others; he is made aware of

²³ Ibid., 190 (Hart’s emphases).

²⁴ Ibid., 191 (Hart’s emphasis).

²⁵ Ibid., 190.

²⁶ Ibid., 191. He continues: “The actions which we speak of as those which are naturally good to do, are those which are required for survival; the notions of a human need, of harm, and of the *function* of bodily organs or changes rests on the same simple fact.” See also the slightly earlier version in “Positivism and the Separation of Law and Morals” [1958], in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), at 81: “...in asking what content a legal system must have we take this question to be worth asking only if *we who consider it cherish* the humble aim of survival in close proximity to our fellows” (emphasis added).

²⁷ Whose survival is my end? Mine at all costs? My children’s, or friend’s, at some risk or even certain cost to my own? My city’s or country’s?...

and takes account of the wants, expectations, and reactions of others; he exerts self-discipline and control in adapting his conduct to a system of reciprocal claims. These are universal virtues and indeed constitute the specifically moral attitude to conduct. ... We have only to conduct the Hobbesian experiment of imagining these virtues totally absent to see that they are vital for the conduct of any cooperative form of human life and any successful personal life.²⁸

So cooperation and social rules have a rationale going well beyond survival: a successful personal life. John Rawls in *A Theory of Justice* (1971) elaborates that kind of rationale in the “thin theory of the good” – the range of “primary goods” which are good for each one of us because needed “*whatever else one wants*.”²⁹ Hart himself had said a little more about his adjusted rationale in 1967: if law “is to be of any value as an instrument for the realization of human purposes, it must contain rules concerning the basic conditions of social life. ... without the protections and advantages that such rules supply, men would be grossly hampered in the pursuit of any aims.”³⁰ Such rules are provided for by social morality, but only in ways that “leave open to dispute too many questions concerning the precise scope and form of its restraints.” Hence the human need for law, for a legal system which has a content – that is, which performs functions -- of the type indicated in the first theme of Hart’s account: the union of primary (mostly duty-imposing) and secondary (mostly power-conferring) rules.³¹

Both Hart and Rawls thus broke the bounds of political philosophy as it was conceived by many in their philosophical circle. They went beyond describing institutions, and beyond generalizations about historically given institutions, to offer – not recommendations of ideals – but sober accounts of what human persons and groups *need* and *rationaly* desire (that is, have reason to act for), and of states of affairs and arrangements that are *universally* valuable (good) for beings with the nature we have (and so are, and figure in, and are sources of, *reasons for action*). To that extent they rejoined the enterprise launched by Plato and Aristotle, though professing to admit only what would be admitted by a Hobbes who openly derided the “old moral philosophers”³² for

²⁸ *Law, Liberty & Morality* (Stanford University Press; London: Oxford University Press, 1963), 70-71. The passage continues: “No principles of critical morality which paid the least attention to the most elementary facts of human nature and the conditions in which human life has to be led could propose to dispense with them.”

²⁹ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 396-407, 433-4. Accordingly, Rawls’s “primary goods” (“liberty and opportunity, income and wealth, and above all self-respect”) are goods that “it is rational to want... whatever else is wanted, since they are in general necessary for the framing and the execution of a rational plan of life”: *ibid.*, 433; also 253, 260, 328. Rawls expressly does *not* contend that “criteria of excellence lack a rational basis from the standpoint of everyday life,” and he grants that “the freedom and wellbeing of individuals, when measured by the excellence of their activities and works, is vastly different in value” and that comparisons of intrinsic value can obviously be made: *ibid.*, 328, 329. But he will not allow such differentiations to enter at all into the rational determination of the basic principles of justice (*ibid.*, 327-32); to do so would be out of line with his “rejection of the principle of perfection and the acceptance of democracy in the assessment of another’s excellences:” 527; also 419.

³⁰ “Problems of the Philosophy of Law” [1967] reprinted in Hart, *Essays in Jurisprudence & Philosophy*, 112. See also 113: “The empirical [not teleological] version of [natural law] theory assumes only that, whatever other purposes laws may serve, they must, to be acceptable to any rational person, enable men to live and organize their lives for the more efficient pursuit of their aims.” And 115: “...all men who have aims to pursue need the various protections and benefits which only laws... can effectively confer. For any rational man, laws conferring these protections and benefits must be valuable, and the price to be paid for them in the form of limitations imposed by the law on his own freedom will usually be worth paying.”

³¹ *Ibid.*, 114.

³² Hobbes, *Leviathan*, c. xi: ed. Oakeshott (Oxford: Blackwell, 1960), 63.

their talk of what is intrinsically and most completely and constitutively good for human persons.

There is truth in John Gardner's remark that Hart and Rawls (with some others unnamed) "together revived political philosophy (and helped to shape as well as capture the distinctive liberalism of the 1960s) by asserting political philosophy's relative autonomy from the rest of moral philosophy."³³ In so far as Hart's political philosophy was embedded in a philosophy of law, one might say more precisely that his attempt was to do political philosophy even if either there is *no* moral philosophy or moral philosophy yields a normative content as minimal as Hobbes professes (alternatives between which Hart's writings waver or, at best, suspend judgment). And his late-period work in philosophy of law shows, even more clearly than before, that the attempt could be sustained only by setting aside his own principal methodological device – the focus of reflection on the *central* case of the reality, "phenomenon," or concept in issue – and looking instead to the marginal and incompletely reasonable, e.g. adjudicating, understood as it is by judges who adjudicate without sense of moral responsibility or justification but perhaps as cynical careerists or Machiavellian promoters of projects foreign or antithetical to the law's (and to the common good).³⁴ On the other hand, Hart's late-period work also shows the extent to which he was willing to admit, at least by implication, that the asserted autonomy of political from moral philosophy was unsustainable. For against Rawls, Mill, Nozick and Dworkin, he objected that attempts to ground *basic individual rights or liberties* – rights such as he himself purported to endorse – on arguments of utility, or on the separateness of persons or their claims to equal respect, or on hypothesized choices by self-interested but partially ignorant parties in an original position, are all foredoomed:

...a theory of basic individual rights must rest on a specific conception of the human person and of what is needed for the exercise and development of distinctive human powers.³⁵

And such a theory of rights "is urgently called for."³⁶

³³ "Introduction by John Gardner," Hart, *Punishment & Responsibility: Essays in the Philosophy of Law* [1970] 2nd edition (Oxford: Oxford University Press, 2008), xlviii-xlix. Gardner's phrase "the rest of" hints at the fundamentally questionable character of this project. He also gives a valuable critical account, at xix-xxiii, of the relationship between Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955) 4-13, and Hart, "Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society* 60 (1959) 1 (essay 1 in *Punishment & Responsibility*).

³⁴ In Hart, *Essays on Bentham: Studies in Jurisprudence & Political Theory* (Oxford & New York: Oxford University Press, 1982), 265-8 the questions of (a) the meaning of the judge's statements of the subject's legal duties, and (b) the judge's own grounds for so stating and enforcing the law, are each treated as a matter of what "may" be the case, as a matter of logical and psychologically possibility, rather than of what makes good and reasonable sense for people seeking really good reasons for action. At p. 267, at the end of the last substantive legal theory that he published, Hart half admits that in arguing "that judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action," he is paradoxically denying the insight on which his legal theory was founded, that rules are reasons for action for subjects as well as officials.

³⁵ *Essays in Jurisprudence and Philosophy*, 17. Hart adds, id.: "I am confirmed in this belief by the fact that when Professor Rawls came to reply to my arguments..., the modifications which he made in his original statement [in *A Theory of Justice*] of his own theory to meet my objections appear both to identify the basic liberties for which he argues and their priority over other values by reference to a conception of the human person and of what is necessary for the exercise and development of what he calls the moral powers."

³⁶ *Essays in Jurisprudence and Philosophy*, 196 (essay first published 1979). This double-edged formula hints at Hart's deep scepticism about our capacity to make rational judgments (or "theories") about such matters.

III

Hart's biographer says, credibly, that *Law, Liberty and Morality* (1963) "stands, over 40 years after its publication, as the resounding late twentieth-century statement of principled liberal social policy. Its ideas continue to echo in both political and intellectual debates..."³⁷ Its key thesis she identifies accurately enough: "democratic states are not entitled to enforce moral standards for their own sake: the mere belief that, say, certain kinds of sexual activity are immoral is not enough to justify their prohibition."³⁸ She remains as innocent as Hart of the profound ambiguities which make his book's resounding success in shaping debate and policy a dismaying triumph of confusion and error.

The book opens with a misstatement of English law, an error which points directly to the whole book's misidentification of the political-philosophical issues at stake:

The Suicide Act 1961, though it may directly affect the lives of few people, is something of a landmark in our legal history. It is the first Act of Parliament for at least a century to *remove altogether* the penalties of the criminal law from a *practice* both clearly condemned by conventional Christian morality and punishable by law.³⁹

But though the individual, private *act* of committing or attempting to commit suicide ceased to be a crime, the 1961 statute rigorously confirmed, indeed strengthened, the criminal law's penalties and prohibitions against any social *practice* of suicide – against any and every kind of assistance, advice, promotion, or facilitation of it.⁴⁰

Hart went on:

Many hope that the Suicide Act may be followed by further measures of reform, and that certain forms of abortion, homosexual behaviour between consenting adults in private, and certain forms of euthanasia will cease to be criminal offences; for they think that here, as in the case of suicide, the misery caused directly and indirectly by legal punishment outweighs any conceivable harm these practices may do.⁴¹

³⁷ Hart, 7 (scil. debates "about a range of social and legal issues such as criminal justice policy, euthanasia, abortion, and human rights"); 2 ("still read by practically all students of law, politics and sociology... the nearest thing to a manifesto for the homosexual law reform movement.")

³⁸ Ibid., 6-7.

³⁹ *Law, Liberty & Morality*, Preface, opening sentences (emphases added).

⁴⁰ Suicide Act 1961, s. 2, imposes imprisonment for up to fourteen years for any counseling (advising), procuring, or assisting in advance of or in the act of suicide; and any attempt to provide such advice or assistance is a serious offence under the general law of criminal attempts. Since assisting suicide is by s. 2 a primary or substantive, not merely an ancillary offence, it follows that requesting such assistance in one's own suicide is itself the (ancillary) offence of inciting the commission of an offence.

⁴¹ Id. He went on, unrealistically, to express doubt that such reforms were likely in the near future. Homosexual acts of adults in private were de-criminalised in 1967, as were most abortions (effective 1968), not to

In all these matters, the structure of the issue at stake was fundamentally the same and was wholly overlooked by Hart. The issue was, and is: supposing that the truly *private acts* of an adult individual, or set of consenting adults, should and/or did cease to be criminal offences, what should be the policy of the law, and of society's other governing institutions (e.g. public education), in relation to the *public promotion or facilitating* of such acts?⁴² After all, in many states outside the Anglo-American world a sharp distinction of principle was and is drawn between *private* and *public*, a distinction well grounded in the philosophical-theological tradition represented by Aquinas.⁴³ A classic articulation of this tradition is in art. 19 of the Argentine constitution, a provision unchanged since 1859 and with antecedents in earlier nineteenth-century constitutions:

19. The private actions of men which in no way offend [public] order or public morality, nor injure a third party, are reserved exclusively to God and exempted from the authority of judges.⁴⁴

In states within this tradition, homosexual sex acts in private were not criminalized, but – speaking of the mid-twentieth century and earlier -- homosexual practice was severely discouraged by prohibitions on homosexual prostitution, propaganda, places of public resort, solicitation in public spaces, adoption of children, pornography, and so forth. The tradition finds expression, implicitly, in the provisions of the European Convention on Human Rights (1950) which make “morals,” implicitly public morals, a permitted ground of restriction on five of the protected rights and liberties.⁴⁵ Hart's *Law, Liberty & Morality* shows no sign, at any point, that its author was aware of this tradition. Indeed, his two references⁴⁶ to the countries where homosexual “acts” were not criminal but homosexuality remained in general disfavor ignore those countries' legal provisions enforcing *public morality* on this matter.

And even when he quotes Lord Simonds articulating the key distinction with precision, Hart misses it entirely. The law lord said:

mention the no-fault, all-on-paper divorce authorized by a statute of 1969. This was already readily predictable in 1963, from, for example, the enactment of the Obscene Publications Act 1959, and the unsuccessful prosecution of the publishers of *Lady Chatterley's Lover* in 1960; and in relation to homosexual acts it was indeed predicted to occur “perhaps at an early date” by Lord Simonds in the passage from *Shaw v Director of Public Prosecutions* [1962] Appeal Cases 223 at 268, quoted by Hart, *Law, Liberty & Morality*, 9.

⁴² In the case of euthanasia, most who have reflected seriously on it, even those who think it morally unobjectionable in itself, conclude that it cannot be regarded as private, since death always has consequences (often highly beneficial) for others and must always be investigated by public authority to ensure that what seemed voluntary was truly so; and that the society-wide consequences of allowing some people to choose to kill others are so unjustly adverse for the vulnerable that even Hart's projected “some forms of euthanasia” would be a grave public evil. See especially *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (New York: New York State Task Force on Life and the Law, 1993); Finnis, “Euthanasia, Morality, and Law,” *Loyola Los Angeles Law Review* 31 (1998) 1123-45.

⁴³ *Summa Theologiae* I-II, q. 100 a. 2c; q. 96 a. 3c; q. 98 a. 1c; and see Finnis, *Aquinas: Moral, Political & Legal Theory* (Oxford & New York: Oxford University Press, 1998), 223-6 and ch. VII passim.

⁴⁴ “Las acciones privadas de los hombres que de ningún modo ofendan al orden y la moral pública ni perjudiquen a un tercero, están solo reservadas a Dios, y exentas de la autoridad de los magistrados.” Constitution of the Argentine Nation, 22 August 1994., art. 19.

⁴⁵ European Convention on Human Rights (1950), arts. 6(1), 8(2), 9(2), 10(2), 11(2).

⁴⁶ *Law, Liberty & Morality*, 52, 68 (“The notion that the overwhelming moral majority would or even could change heart morally and shed these deep instinctive feelings, if the State did not reflect in legal punishment their moral views on homosexuality, seems fantastic and is quite at variance with the experience of those countries where homosexuality between consenting adults in private is not legally punished”).

Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence [at common law] if even without obscenity such practices were publicly advocated and encouraged by pamphlet and advertisement?⁴⁷

Hart simply ignores this issue,⁴⁸ dismissing the relevant paragraph as mere “judicial rhetoric in the baroque manner.”⁴⁹

Yet these serious deficiencies in Hart’s handling of the legal issues are overshadowed by his mishandling of his principal theoretical topic, the idea of *enforcing morality as such*. “Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime? To this question ...”⁵⁰ But here we should interject. The tradition of political philosophy flowing from Plato and Aristotle would have answered: “This question” is not one, but at least two. For the fact that conduct is “by common standards immoral” is never sufficient justification for punishing it; common moral standards notoriously may be more or less immoral. And if “morality as such” means, as Hart presumes, the same as common moral standards *qua* common, the same reply applies. But if “(im)morality as such” refers (as it should) to what critical morality rightly judges (im)moral, then the tradition divides between (a) the Platonist-Aristotelian stream which “paternalistically” authorizes penalizing immoral acts for the sake of the character of those who do or would otherwise engage in them, and (b) the Thomist tradition which we have seen articulated in the Argentinian constitution, authorizing penalization only when the act has a public character and jeopardizes public order or public morality or the rights of others.

Hart, alas, did not envisage either or any of those responses,⁵¹ but plunged off in another direction, suggested to him by the ruminations of an English judge of no philosophic formation, Patrick Devlin. Having pointed to the pertinent distinction between critical and positive morality, Hart summarised the question his book tackles:

⁴⁷ *Shaw v Director of Public Prosecutions* [1962] Appeal Cases 223 at 268, quoted by Hart, *Law, Liberty & Morality*, 9.

⁴⁸ In the event, English law followed this course during the thirty-five years after the decriminalization of private adult homosexual acts in 1967, the publication of advertisements by private individuals of their availability for (even non-commercial) private homosexual acts remained an offence at common law (*Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] Appeal Cases 435, following Lord Simonds in *Shaw*); and the statutory prohibition of “importun[ing] in a public place for an immoral purpose” was repeatedly held to extend to public importuning of adult males by adult males (e.g. *Regina v Goddard* 92 Criminal Appeal Reports 185 (1990)). For evidence of Hart’s later attitude to these ways of upholding public morality, and to the supportive but short-lived attempt to exclude from state schools the promoting among children of favour for homosexual parenting, adoption, and ways of life, see n. 62 below.

⁴⁹ He proceeds to distract himself (*ibid.*, 10-11) with two thoughts: (i) that the Law Lords’ approval of the trial judge’s direction about “conspiring to corrupt public morals” implies that “there need...be no approach to the ‘public’ nor need the morality in question be ‘public’ in any sense other than being the generally accepted morality;” and (ii) that the authorities might circumvent precise statutory decriminalization by charging the decriminalized act itself under the common law concept of “corruption of public morals” – something that in fact was never done, and if attempted would have been unsuccessful on a number of legal grounds.

⁵⁰ *Ibid.*, 4.

⁵¹ In 1967, revisiting the debate, he begins by reporting (at last) what he calls “the classical position”, corresponding to the Platonist-Aristotelian as sketched above; he ignores the Thomist position, and says he will have nothing to say about the classical. (The same paragraph confirms his unawareness of the mainstream Christian (and Thomist) position that the strict requirements of revealed morality are *also* natural, that is accessible, under favorable epistemic conditions, by reason unaided by revelation.) See “Social Solidarity & the Enforcement of Morality” in *Essays in Jurisprudence and Philosophy*, at 248.

“our question is one of critical morality about the legal enforcement of positive morality.”⁵² That was indeed Devlin’s artless question. But it was a question that no one ought to take very seriously.⁵³ For when one is deliberating about the moral and the immoral, “positive morality” is never determinative. Of course, customs can earn normative force in a critical morality; and one cannot reach a critical morality without working through the morality in which *de facto* one was brought up. But positive morality, as such, is nothing other than the set of opinions held, in fact, by a group of persons, concerning right and wrong actions, dispositions, etc. Such opinions, as facts about that group’s beliefs, can never settle, for the deliberating citizen, what that (or any other) citizen *should* judge to be right or wrong.

In Hart’s own terminology – employing the fruits of his main analysis in *The Concept of Law*⁵⁴ – the central case of morality understood from *the internal point of view* is (what the deliberating person takes to be) *critical*, that is, justified, morality. Conscientiously deliberating persons are deliberating about what they should count as *reasons* for action, and the bare fact that others count something a reason does not constitute something a reason (though it may be persuasive as material for some evidentiary presumption that those other persons have some good reason for their belief). Indeed, one is scarcely thinking morally unless one considers that one’s deliberated judgment could be morally right even if no-one else now agrees with it. If we are interested in what “morality as such” requires, references to positive morality are beside the point: morality as such just is *critical* (which is not to say that the deliberating person will succeed in critically judging aright, or that everyone or indeed anyone will *de facto* agree with that person’s judgment).

Hart’s exclusive focus on positive morality cut the debate off from the main political-philosophic tradition, and from reason. It generated a casual presumption that those who uphold a group’s morality have no moral reasons for doing so, or that no-one need enquire what those moral reasons might be.⁵⁵ This pernicious presumption has a first manifestation in Hart’s never examined assumptions that “deviations from conventional sexual morality such as homosexuality afford the clearest examples of

⁵² *Law, Liberty & Morality*, 20.

⁵³ I am setting aside, as secondary, unfruitfully vague, and lacking in generalisable evidence, the question (one of fact) debated by Hart and Devlin: Will the non-criminalization of strongly held moral opinions lead people who hold them to crumble in their allegiance to society and/or their own morality?

⁵⁴ Note that in *CL*’s set-piece discussion (168-84) of morality, Hart was clearly failing to grasp that even the adherents to a widely or universally accepted morality will each, at least in the central case, be adhering to it not because the others do but because they each consider it right, that is, consider it justified by its successful articulation of the requirements of the wellbeing, dignity, honor, excellence, etc., of persons and groups. This serious failure in Hart’s analysis was pointed out by Ronald Dworkin in 1972, who described what I have called the critical internal point of view in such a case as a “consensus of *independent conviction*” (as opposed to a consensus of convention, in which the general conformity of the group is counted by the individual members as the, or a, reason for their acceptance of it): “The Model of Rules II” (originally “Social Rules and Legal Theory,” *Yale Law Journal* 81 (1972) 855) in Dworkin, *Taking Rights Seriously* (Harvard University Press, 1972), at 53. In the posthumously published Postscript to *The Concept of Law*, Hart conceded all this (255-6), admitting that the book had not provided “a sound explanation of morality, either individual or social.” He had in fact been aware of this error, which he recognized as “large,” since at latest 1980: see Lacey, *H.L.A. Hart*, 335-6.

⁵⁵ The recent counterpart to this resultant of Hart’s mistake is Dworkin’s: Dworkin, *A Matter of Principle* (Cambridge, Mass. & London: Harvard University Press, 1985), 67-8, 368. Analysis and critique: Finnis, “A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence,” *Proceedings of the British Academy* 52 (1986) 303-331 at 309-311; “Universality, Personal and Social Identity, and Law,” (2007), <http://ssrn.com/abstract=1094277>.

offences which do not harm others,”⁵⁶ and that “sexual morals [are obviously] determined...by variable tastes and conventions.”⁵⁷ Test this claim by reference to that part of sexual morality (by no means the most significant or interesting part) on which Hart chose to focus. Those who actually judge homosexual acts, *like other non-marital sex acts*, immoral, while they might grant that the private homosexual sex acts of two already morally corrupt adults in private do no harm, can argue with force that predisposing children to approve of adult homosexual sex acts (and/or to be disposed to engage in them when of age) is gravely and unjustly harmful to the child and to society. For, like other misconceptions of what is good and bad in sexual choices, this approval involves the child, and eventually the society, in a gross misunderstanding of the contribution sex acts have to make – and of the act-descriptive conditions without which such acts cannot make it -- to marriage as the indubitably most favourable and fairest milieu for the procreation and upbringing of children and for the lifelong fulfillment of the married persons themselves.⁵⁸ Sexual morals, when upheld not only as justified but in a critical reflective manner, or in a community or tradition that has given really critical attention to justifying its judgments, are obviously not determined merely or primarily by variable tastes and conventions, but by living judgments about fundamental features of human nature – that is of the conditions for human well-being and fulfillment – features philosophically explored, essentially without deference to taste or convention,⁵⁹ by Plato and Aristotle and more fully and adequately by Aquinas.

The issues at stake in sexual morality are such that sensible argument and deliberation about it will be no mere juxtaposition of “recommendations of ideals”. It will involve attention to human needs, opportunities and makeup (both individual and social⁶⁰), to biological, physical, psychological realities and to such spiritual possibilities as commitment, in friendship, to paternity and maternity. If the Bloomsbury set – to speak only of the ideas with which Hart’s closest circle in the 1930s and after were imbued -- propose a critical sexual ethic in which little is forbidden save sexual jealousy, and friendship even between spouses is supposed to be unaffected by sexual acts with others, a critical moral response can uphold the traditional position – not *as* traditional, Christian or conventional – but as far superior in realism about human character, opportunity and fulfillment. Such a response cannot be elaborated here. Enough to say two things.

First, the critical moral response the Bloomsbury set’s now widely accepted and practised assumptions about sexual intimacies is fundamental not only to individual ethics but also to political philosophy. Plato’s thought experiments about sharing of sexual partners in his *Republic* were what Aristotle chose as a first priority for critical demolition in his *Politics*.⁶¹ But Plato himself had pre-emptively adopted the essential

⁵⁶ *Law, Liberty & Morality*, preface.

⁵⁷ *Ibid.*, 73.

⁵⁸ See Finnis, “Natural Law and the Classical Tradition”, sec. 19 (“Law and Sexuality”), in Jules Coleman & Scott Shapiro, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2000), 1-60 at 41-45; and works cited in n. 64 below.

⁵⁹ See Plato’s telling remarks about the counter-cultural character of his own judgments about homosexual acts, and about the opposition they meet from people who are led by their unintegrated desires: *Laws* VIII, 835c, 839b.

⁶⁰ Social needs include, above all, an adequate and voluntary response to the fact recalled in Shakespeare’s Erasmian *Sonnet* XI: “If all were minded so,” that is, not to procreate, “the times should cease, / And threescore year would make the world away.”

⁶¹ *Politics* II, 1-2: 1260b37-1264b3; Finnis, *NLNR*, 144-6, 58-9.

results of that critique in his own last work, the *Laws*, where sex acts of a behaviourally non-procreative kind are treated as immoral, and their promotion a threat to the political community, because of their incompatibility with stable, loyal and procreative friendship between man and wife.⁶² That the nuclear family (with its grandparents and grandchildren) is the “the natural and fundamental group unit of society” was as evident to the founders of political philosophy as to the culturally diverse authors, sponsors and signatories of art. 16(3) of the Universal Declaration of Human Rights -- evident, that is, not as a mere assumption but as a thesis warranted by careful attention to persons, world, and society, and by dialectical argument against objections. In the philosophy of practical reason (in which individual ethics, political philosophy and legal theory have a primary place), that warranted thesis can be seen to be among practical thinking’s first principles, picking out *marriage* as one of the basic aspects of human wellbeing.⁶³

Second, direct ethical engagement with the Bloomsbury ethic can with critical justification unfold an understanding⁶⁴ of sex acts: that they have full intelligibility as, and only as, marital, that is, as expressing, actualizing and enabling the spouses to experience commitment to marriage’s uniquely appropriate context for procreative friendship and responsibility; and that that intelligibility is lost insofar as spouses hold themselves conditionally ready to engage (or be complicit in others engaging) in non-marital sex acts, as they do if they even approve of non-marital sex acts. On such a view – implicit in the common-sense of millennia -- the sexual “jealousy” (better: resentment) tabooed by the Bloomsbury ethic is both predictable and natural because the sex act’s unique appropriateness for expressing exclusive commitment, *fides*, is natural (that is, fully intelligible); and the ethic of sexual liberation is a recipe for – to use Hart’s favorite word in *Law, Liberty & Morality* – misery. Its malign results include the misery induced by the side-effects of efforts, even successful efforts, to suppress and condemn one’s own or others’ reactions to want of *fides*. But the miseries to be counted extend also to the wider effects of sexual “liberation” on children in their years of radical dependency, vulnerability and need; and on those killed or damaged by damaged children; and quite generally on the vulnerable.⁶⁵

The “distinctive liberalism of the 1960s” was distinguished by concern that its challenges to the social enforcement of moral condemnations of types of conduct should not seem to challenge those moral condemnations themselves.⁶⁶ This concern doubtless

⁶² *Laws* VIII, 835b - 842a.

⁶³ On Aquinas’s presentation of marriage as the subject of a first principle of practical reason, see Finnis, *Aquinas*, 82, 97-8, 143-54.

⁶⁴ See op. cit., supra n. 58; Finnis, “Marriage: A Basic & Exigent Good,” *The Monist* 91 (2008) 396-414, and works there cited.

⁶⁵ Jennifer Hart, *Ask Me No More*, 38, defends the Bloomsbury set’s sex ethic as natural; remarks that the set’s founder members “themselves seem not to have felt sexual jealousy” (here both the word “themselves” and the word “seem” are significant); and appeals to lines 149-63 of Shelley’s *Epipsychidion*, condemning fidelity to “one chained friend” and claiming that “to divide is not to take away.” The year after composing and publishing it, the poet repudiated it as misbegotten, misconceived: “the *Epipsychidion* I cannot look at; the person whom it celebrates was a cloud instead of a Juno, and poor Ixion starts from the centaur that was the offspring of his own embrace” (Letter to John Gisborne, June 22, 1822.) No need to dwell upon his wife’s suicide and other miseries Shelley’s “dividing” of his sexual attentions actually brought about for women and children.

⁶⁶ When, by the 1980s, that liberalism had extensively succeeded in changing laws and public policies, but still had further to go, these restrictions fell away. Thus *H.L.A. Hart*, 356, reports: “His reaction [in the 1980s] to Thatcherite social policies, particularly in the areas of education and sexual morality, reached the level of outrage. The enactment of ‘clause 28’, which prohibited local government from ‘promoting’ or using funds to ‘support’ propagation [in schools administered by local government] of the message that homosexual relationships [‘as a pretended family

contributed to Hart's resolute non-engagement with any part of the real case for those condemnations and their direct or indirect enforcement. If the misconceived and sterile "Hart-Devlin debate," and Hart's plausible success in it, had a large and long-lasting social impact, that suggests a decay going wider than just in the practice of political philosophy.⁶⁷

IV

European states in the early twenty-first century move ever more clearly out of the social and political conditions of the 1960s into a trajectory of demographic and cultural decay; circumscription of political, religious and educational speech and associated freedoms; pervasive untruthfulness about equality and diversity; population transfer and replacement by a kind of reverse colonization; and resultant internal fissiparation foreshadowing, it seems, ethnic and religious inter-communal miseries of hatred, bloodshed and political paralysis reminiscent of late twentieth century Yugoslavia's or the Levant's. So the time seems ripe for a wider reflection on whether late twentieth-century political philosophies so characteristic, so suasive, so victorious, as Hart's correspond or correlate with these evils, or indeed contribute to their onset or progression.

That Hart had a political philosophy at all was an act of conscious resistance to scepticism. This resistance extended beyond the setting aside of methodological scepticism such as Quinton representatively articulated. It was particularly evident in Hart's repudiation of twentieth century behaviorist (naturalist, scientific) reductionism, whether that took the form of Scandinavian or American legal "realism", reducing the normative to the predictive or magical or diagnostic, or of Hobbesian or Austinian accounts of choice and action as mere predominant desire and muscular contraction, or of mid-twentieth century criminological/penological theories denying responsibility by treating human behaviour as merely a more or less predictable cause of preventable harm.⁶⁸

But the resistance was itself shaped and limited in its extent and content by Hart's own scepticism about something more foundational, the truth-value, and truth, of moral judgments (that is, as we have seen, of moral judgments intended as critical because asserted as true, sound, really justified). Only very late in his career did Hart allow

relationship'] were of equal moral value to heterosexual ones, drew his particular wrath. 'I loathe it...', he told David Sugarman, who interviewed him in 1988."

⁶⁷ The climax of the lectures on knowledge and the good in Plato's *Republic* given in Hart's first years as a student by his tutor and friend H.W.B. Joseph and published, without comment or commentary, by Hart in 1948, is Joseph's conclusion about the point of the allegory of the Cave (*Rep.* 514a-517a): that what we need is not just intellectual formation from inevitable ignorance, but conversion "from a plight into which we ought not to have come" but have come through the "evil training" of social institutions; for though leaving people free to develop "naturally," without such institutions, would only allow other pressures to distort and block sound judgment, it is in fact "the pressure of lies that acts on us in States as they now are; and only by a hard struggle can a man reach, and only in the face of obloquy and opposition from those whom it disturbs can he teach, the truth." H.W.B. Joseph, *Knowledge & the Good in Plato's Republic*, ed. H.L.A. Hart (Oxford: Oxford University Press, 1948), 43-4. It was not Hart's fate to have to face much obloquy on account of his teaching about critical morality's exclusions and requirements in politics and law, teaching which found prompt favour and recognition (Lacey, *H.L.A. Hart*, 274) from the mid-sixties Labour government which superintended the liberalization of laws on pornography, abortion, homosexual acts, and divorce.

⁶⁸ So "scepticism" or its cognates appears as an antagonist in almost all the nine essays in *Essays on Punishment & Responsibility*.

himself to affirm in print this deep-going doubt, or rather denial.⁶⁹ But a determining consideration, throughout *The Concept of Law*, was that neither author nor reader, in taking a stand on issues in political or legal philosophy, need make any judgment about whether there are any “true principles of right conduct rationally discoverable,”⁷⁰ or whether instead moral judgments are but “expressions of changing human attitudes, choices, demands, or feelings.”⁷¹ In that book, the explicit attempt to “evade these philosophical difficulties”⁷² drives the reduction of law’s rationale to survival, the later repudiated assimilation of moral judgment to articulation of positive (“consensus of convention”) morality, and the pervasive refusal to identify a central case of the internal point of view.

And in the discourse about the proper limits of the criminal law, the scepticism about morality is surely one primary motivation for the falling away from the level of Plato, Aristotle and Mill to the essentially unphilosophical and irrelevant dialectic with Devlin. The popular success of that dialectic is a measure of the widespread loss of philosophical culture in the 104 years between *On Liberty* and *Law, Liberty & Morality*. For the first chapter of Mill’s book makes the truly foundational issues explicit. It does so by its combined contentions (i) that state coercion may well be justifiable in the interests of the improvement of immature individuals or societies, or to protect a state where relaxation of “the mental discipline” of any citizens might result in the overthrow of the state by “foreign attack or internal commotion”, and (ii) that the “salutary ... effects of freedom” in accomplishing the necessary minimum of improvement in or of modern societies are “permanent” effects, so that the qualifications on the “principle of liberty” that were articulated in the first of those contentions can now, with us, be simply set aside. Hart criticized *On Liberty* for relying on a presumption of “middle-aged” psychological caution and stability to justify rejecting paternalism in relation even to uncontroversial harms.⁷³ But he, and with him the whole extensive academic and popular discourse he inspired, left unexamined the much more deep-going and far-reaching issues raised by each of those Millian contentions.

That failure was symptomatic of a wider failure to examine a question extensively studied by Plato and Aristotle: What elements of individual and societal makeup are

⁶⁹ See n. 3 above, and the later review of Bernard Williams discussed in the article cited in n. 65 below.

⁷⁰ *CL*, 186. Right here the book employs a version of the simile that Hart’s notebooks from the book’s earliest gestation mark out as the (or at the very least, a primary) problematic in the book’s conception: “the disputants on one side seem to say to those on the other, ‘You are blind if you cannot see this’ only to receive in reply, ‘You have been dreaming.’” See Lacey, *H.L.A. Hart*, 222; Finnis, “On Hart’s Ways: Law as Reason and as Fact,” *American Journal of Jurisprudence* 52 (2007) 25-53 at 51.

⁷¹ *CL*, 168.

⁷² *Id.*, explicitly reaffirmed in the posthumous Postscript, *ibid.*, 253-4. Orrego argues plausibly that Hart’s motivation in postulating and holding to this agnosticism of legal philosophy about the objectivity or truth of moral judgments (even while, in his late work, casting doubt on the objectivity of legal rules and judgments as reasons for action!) was, in large measure, to protect legal positivism against the charge – damaging in the post-War years when the critique and punishment of Nazi wickedness made ethical scepticism unattractive -- that it was a theory committed to ethical scepticism and/or relativism: Cristóbal Orrego, “Hart’s last legal positivism: morality might be objective; legality certainly is not,” in Kenneth Einar Himma, *Law, Morality and Legal Positivism* (Franz Steiner Verlag, 2004) 73-9 at 77-8. (Orrego also shows, *ibid.*, 75, that in my “Law and What I Truly Should Decide,” *American Journal of Jurisprudence* 48 (2003) 107-29 at 11 n. 4, I was misunderstanding Hart’s tortured discussion in his *Essays on Bentham*, 266-7 as insinuating moral scepticism, when in fact Hart (though, as *other* evidence shows, a moral sceptic) was there implying scepticism about the objectivity of *legal* reasons for action.

⁷³ *Law, Liberty & Morality*, 33. Hart accordingly accepted a limited measure of paternalism in relation to more or less physical or psycho-somatic harms.

presupposed by political institutions capable of upholding justice and freedom and the practice of political philosophy itself? Primary and indispensable in such an examination will be two inter-linked questions, (a) the preconditions of shared sympathies, memories, temperaments, beliefs and aspirations necessary to uphold the polity's existence against external enemies and internal subversion or want of civic spirit, of allegiance, of give and take, and of willingness to make personal and familial sacrifices for the common good, and (b) the ways of educating children and the structure of procreative and familial relationships (and related socio-economic and political practices) needed to maintain a population and its necessary civic spirit, not least its will to uphold a liberty neglected by Hart and his followers, the collective liberty of national self-determination. But, though Hart sketches a kind of analogue to Aristotle's ascent to the political via families and neighborhoods – in *The Concept of Law*'s ascent to the legal, up from the pre-legal social order of “social morality's” “primary rules” sustainable or tolerable only in “a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment”⁷⁴ – his consideration of these rules never asks whether they include such rules as might be needed to order procreation and education within such a community.⁷⁵ And his repeated consideration of the disunity between officials and others in a legally ordered state focuses on the threat of internal oppression, not on the preconditions for the society's sustainability.⁷⁶

As for *Law, Liberty & Morality*, its evasion or oversight of all questions of activities affecting public morality, as distinct from the truly private acts of consenting adults, results in thoroughgoing neglect of the question what conditions of procreation and education and self-understanding are needed to sustain political culture, and philosophy, and indeed the political community itself in face of threats external or internal. A liberalism that consciously evades “material” moral issues,⁷⁷ as controversial or non-neutral, is prone indeed to evade essential facts, causalities, inter-dependencies and the like, even when these tend to determine outcomes fundamentally. And prone to neglect the rational force of valid slippery slope arguments,⁷⁸ which point to the significance of adopting principles which justify not only actions and effects now desired

⁷⁴ CL, 92, 169, 198.

⁷⁵ Contrast Aristotle, *Nicomachean Ethics* VIII.12: “Between husband and wife friendship seems to exist by nature; for man is naturally inclined to form couples even more than to form polities, inasmuch as the household is earlier and more necessary than the polity... human beings live together not only for the sake of reproduction but also for the various purposes of life; for from the start their functions are divided, and those of man and woman are different; so they help each other by throwing their peculiar gifts into the common stock. It is for these reasons that both utility and pleasure seem to be found in this kind of friendship. But this friendship may be based also on virtue, if the parties are good; for each has his or her own virtue and they will delight in that fact. And children seem to be a bond of union (which is the reason why childless people part more easily); for children are a good common to both and what is common holds them together.”

⁷⁶ See e.g. CL 117 (“the sheep [members of the disaffected majority] might end on the slaughterhouse.”)

⁷⁷ See the passage quoted above at n. 28. In *Law, Liberty & Morality*, at 24, Hart casually presumes that the (unimportant and unclarified) issue of political morality he was debating with Devlin is “surely, more interesting” than any question about “the content of the morality to be enforced.”

⁷⁸ See Douglas Walton, *Slippery Slope Arguments* (Oxford: Oxford University Press, 1992). Hart's published reflections on abortion display no interest in the implications or consequences of introducing into law and public policy approved killing of vulnerable innocent human beings, whether at the beginning or the end of a lifespan or in other conditions of vulnerability or of inconvenience or risk to others.

but also actions and effects which others may well desire in some future time, perhaps imminent.⁷⁹

Thus Hart's normative political philosophy has little indeed to say about the inter-relations of common good, justice and liberty in a nation whose liberty-minded citizens have largely given up procreating – or rather, bearing -- children at a rate consistent with their community's medium-term survival, and whose law, considered in its much-observed implications, marks out for them a path towards, first the loss of national self-determination;⁸⁰ and then their own replacement, as a people, by other peoples, more or less regardless of the incomers' compatibility of psychology, culture, religion or political ideas and ambitions, or the worth or viciousness of those ideas and ambitions; and finally to the ruinous loss of most or much that Hart worked for, or took for granted, as precious. So there arises an interesting question for reflective speculation. How far were the deficiencies of political philosophies such as Hart's encouraged by – even as they, perhaps unwillingly (or at least reluctantly),⁸¹ encouraged -- the “inclination” or “mood” depicted by Voegelin in 1952: the inclination to take one's society's existence, especially when it has had “a long and glorious history,” for granted “as part of the order of things,” “an inclination to disregard the structure of reality, of relaxing into the sweetness of existence, of a decline of civic morality, of a blindness to obvious dangers, and a reluctance to meet them with all seriousness,” the mood of late, disintegrating societies no longer willing to fight for their existence⁸² (an existence which is also a precondition for their serving the common good of peoples and territories beyond their own)? Or were those political-philosophical deficiencies encouraged instead by the *contrasting* predispositions mentioned by Voegelin in the same passage: predispositions to an *activism* shaped by a kind of faith, such as liberal or Marxist or National Socialist beliefs in essentially inevitable cultural progress? After all, Mill's activist “doctrine of liberty,” as Hart called it, confessedly rested on just such a faith, in “the salutary *permanent* effects of freedom”⁸³ – that is, we should now say, on sub-rational, spiritually disordered faith in a course of history that had brought societies such as ours up to a plateau of

⁷⁹ Hart was aware, as he told me on his return from Australia in 1971, that in his advocacy of abortion law reform in the 1960s he had failed to anticipate the scale of the institutional and social changes that would – with what he now saw to be quasi-inevitability – follow the removal of the criminal prohibition of certain specified classes of interventions by doctors on their patients. For the general point, without the admission of personal non-anticipation, see Hart, “Abortion Law Reform: The English Experience,” *Melbourne University Law Review* 8 (1971-2) 388 at 408-9. Of the benefits of the liberalization, Hart put first (*ibid.*, 400-402, 411) the reduction in illegitimate births, which since he wrote have multiplied (as a proportion of all births in England and Wales) over five-fold. He was (402) unwilling to believe that the change in the law had led or would lead many women to change their sexual habits or attitudes to contraception.

⁸⁰ See my discussion, building on Raz's, in Part V of Finnis, “Universality, Personal and Social Identity, and Law,” (2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094277

⁸¹ See, e.g., Lacey, *Hart*, 268-71, especially the 1987 interview quoted at 270, in which Hart says “I think I am torn between my theories and my emotions here.” He was speaking of his support for an open borders policy (“a country to which anybody is entitled to come”) and his opinion that “what is valuable is an inherited culture, and any sharp discarding of that is objectionable, and indeed monstrous. . . . I suspect that it's too much to demand that people should disregard the ties of kith and kin absolutely – it's an ethic of fantasy that these could be put aside.”

⁸² Eric Voegelin, *The New Science of Politics* (Chicago & London: University of Chicago Press, 1952), 168. Not long after Hart had asked me to contribute a book to his series, and to call it *Natural Law & Natural Rights*, I read this book and the contemporaneous article on Oxford political philosophers. My book articulates a philosophical theory offering to supply the element missing, as Voegelin's article observes, in virtually all the Oxford political philosophers, the element he named (*op. cit. supra* n. 5 at 103, 109), I think obscurely, “a science of principles” and “philosophical anthropology.”

⁸³ Mill, *On Liberty*, ch. 1 (emphasis added).

progress from which there *would not be* a falling off. Or was it neither of those predispositions, but instead no more than Oxford philosophers' standard bad practice of discussing, say, Plato's or Mill's "theories" and "doctrines" with a kind of detachment from their deepest truth-conditions? For these "truth-conditions," taken broadly and adequately, include not only those great authors' reasonable will to get beyond theories and doctrines to the realities (actual and realizable) which, along with coherence, are the measure of the conceptual, but also careful attention by both authors and readers to the realities and goods⁸⁴ without which it would be impossible or senseless to engage in philosophical inquiry of any kind.⁸⁵

Perhaps, rather, all three predispositions to error contributed to the philosophical deficiencies I have indicated. All are encouraged by aversion to acknowledging reality's full range and partly transcendent structure, the deep aversion which I mentioned in section I's last paragraph's first sentences.

⁸⁴ On the fundamental importance of conceiving the study of ethics (including political theory) as a *practical* undertaking, see Finnis, *Fundamental of Ethics* (Oxford University Press and Georgetown University Press, 1983), 1-6.

⁸⁵ See Finnis, "Natural Law and the Ethics of Discourse," *The American Journal of Jurisprudence* 43 (1999) 53-73; also (with Habermas's reply) in *Ratio Juris* 12 (1999) 354-373. Obviously, Plato's reflections (taken up in that article) on the will to seek truth and friendship, and the opposing will to domination, need to be extended to accommodate such historically and politically important realities as the sub-theological, sub-philosophical will (such as Mill's – or perhaps at least his wife Harriet Taylor's) to believe in ineluctable progress and avert the eyes from the fragile preconditions for a sustainable civil order (and social practice of philosophy).